86-583

Supreme Court, U.S.
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CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM AUSTIN AND AULEMIC, INC.,
Petitioners,

v.

LEXINGTON INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

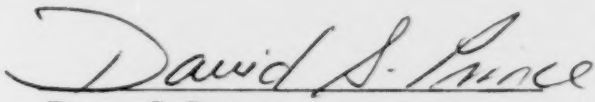
1. Did the court of appeals err in refusing to apply a controlling Texas statute to a marine insurance policy as mandated by Congress in the McCarran Act and by this Honorable Court in *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955) and *Hooper v. California*, 155 U.S. 648 (1894).

2. By reaching out to decide a question of Texas state law currently pending before that state's highest court, did the court of appeals violate fundamental principles of federalism dictated by the United States Constitution, the McCarran Act, and the decisions of this Honorable Court.

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following list of parties have an interest in the outcome of this case.

1. Respondent, Lexington Insurance Company
2. Vinson & Elkins
3. Petitioners, Jim Austin and Aulemic, Inc.
4. Lorance & Thompson



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OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 794 F.2d 941. The opinion of the district court (App. B) is reported at 610 F. Supp. 229.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1986. A timely suggestion of rehearing en banc was denied on August 4, 1986 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IX of the Constitution of the United States provides in pertinent part:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X of the Constitution of the United States provides in pertinent part:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people.

The McCarran Act, 15 U.S.C. § 1011 (1945) provides in pertinent part:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

The McCarran Act, 15 U.S.C. § 1012 (1945) provides in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

STATEMENT OF THE CASE

This is a shipowner's action against a marine hull insurer which unlawfully denied the vessel owner's claim for damages under a hull insurance policy issued by the insurer. The vessel was owned and operated at the time of the loss by Jim Austin and his wholly-owned corpora-

tion, Aulemic, Inc., and was insured with Lexington Insurance Company. While under a long-term charter to Servac Shipping Line, Ltd., the ship suffered a casualty and Austin, the shipowner, requested his hull insurer, Lexington Insurance Company, provide coverage for the necessary repairs. Lexington denied coverage the day after the loss was reported based on a misstatement of maritime law and summarily closed its claim file. As a result thereof, Servac refused to continue with the long-term charter and the shipowner was subsequently forced to sell his vessel unrepaired for salvage.

The action was brought in the United States District Court for the Eastern District of Texas. The district court, sitting in admiralty entered judgment in favor of Austin and Aulemic, Inc. against Lexington for the reasonable cost of repairs owed under the policy, plus treble damages under Article 21.21 § 16 of the Texas Insurance Code and stipulated attorney fees. The court of appeals affirmed the district court's award of damages against Lexington for the reasonable cost of repairs and for attorneys fees, but refused to apply the controlling Texas Statute and reversed the district court's award of treble damages based on that Statute.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

The opinion of the court of appeals in this case refusing to apply the Texas Insurance Code to a marine insurance policy has cast aside more than a century of uniform precedents of this Court interpreting marine insurance policies and the express policy mandated by Congress in the McCarran Act. Even before this Court's

opinion in *Paul v. Virginia,* 75 U.S. 168 (8 Wall.) 168 (1869), the power to regulate the insurance business had been left to the States. As early as 1894, this Court applied this rule to marine insurance policies in *Hooper v. California,* 155 U.S. 648 (1894). This Court has succinctly summarized the origin of insurance law in this country:

> The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being.[1]

Although Congress recognized that marine insurance companies were operating under state laws as early as 1920,[2] it was the passage of the McCarran Act[3] in 1945 which expressly set forth Congress' intent that "the business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business." 15 U.S.C. § 1012. Agreeing with the policy in the Act, this Court then held in *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 348 U.S. 310 (1955):

> "We, like Congress, leave the regulation of marine insurance where it has been—with the States."

348 U.S. at 321.

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1. *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 348 U.S. 310, 316 (1955).

2. Merchant Marine Act of 1920, 41 Stat. 1000, 46 U.S.C. § 885 (a)(2).

3. 15 U.S.C. §§ 1011-12 (1945). The Act was passed in response to this Court's decision in *United States v. South-Eastern Underwriters Assoc.,* 322 U.S. 533 (1944).

Against this legal background, the court of appeals was presented with a Texas shipowner's action against a marine insurer on a hull insurance policy issued to the shipowner in Texas. The insurer was found by the district court to have violated the Texas Insurance Code which allows the insured to recover treble damages and attorney's fees against an insurer engaging in unfair claims settlement practices.[4] The district court's holding was based on the decisions from the highest state court in Texas which have uniformly awarded treble damages against insurers engaging in unfair claims settlement practices.[5] Without citing any of the decisions of the Texas Supreme Court, the court of appeals refused to apply the Texas Statute for a reason not enumerated in the Statute and not enunciated by the state's highest court. Despite the fact that the Texas Supreme Court has granted a treble demage recovery against a property insurer in *Royal Globe v. Bar Consultants,* 577 S.W.2d 688 (Tex. 1979), the court of appeals created[6] an exception

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4. *See* Tex. Ins. Code Ann. Art. 21.21 § 16 (Vernon 1981), App. D.

5. *Royal Globe Insurance Company v. Bar Consultants, Inc.,* 577 S.W.2d 688 (Tex. 1979); *Mayo v. John Hancock Mutual Life Insurance Company of Boston, Mass.,* 711 S.W.2d 5 (Tex. 1986).

6. The district court's award of treble damages was based on two independent and alternative grounds. The first was Lexington's violation of Tex. Ins. Code Ann. Art. 21.21 § 16 and Tex. Ins. Board Order 41060 (App. D) as permitted by the Texas Supreme Court in *Royal Globe v. Bar Consultants, Inc.,* 577 S.W.2d 688, 691 (Tex. 1979) and again held actionable by the Texas Supreme Court in *Mayo v. John Hancock Mutual Life Insurance Company of Boston, Mass.,* 711 S.W.2d 5 (Tex. 1986). The second was for Lexington's violation of Tex. Ins. Code Ann. Art. 21.21 § 16 and Tex. Ins. Board Order 27085 (App. D) (a disputed issue in the Texas intermediate appellate courts). The court of appeals chose to reverse the district court's treble damage award on the second point even though there was an independent alternative ground to affirm the district court which was not attacked by Lexington.

for a marine property insurer, denying recovery for the insurer's unfair claims settlement practices found by the district court.

The refusal by the court of appeals to follow the Texas Insurance Code as interpreted by the Texas Supreme Court has created a serious breach in the uniform policy enunciated by this Court and Congress in marine insurance law. If a federal court can pick and choose which state statutes it will apply to marine insurance policies despite the interpretation given the statute by the state's highest court, then federal interference with state insurance law will prevent effective regulation by the states as mandated by Congress. The interference is particularly invasive when an insurer is absolved from the statutory penalties for its conduct violating state law, as the court of appeals held in this case.

II.

In reversing the district court's award of statutory damages recoverable under Texas law, the court of appeals ruled that the marine property insurer, although not exempted from the Texas Insurance Code by the Texas Legislature or Texas Supreme Court, should not be subject to the statutory damages which other insurers writing insurance in Texas must pay when they are found to have engaged in unfair claims settlement practices in violation of the Texas Statute. Before the court of appeals rendered its decision, the Texas Supreme Court granted a Writ of Error to review one of the intermediate appellate court decisions relied on by the court of appeals to reverse the district court. *Chitsey v. National Lloyds Insurance Company*, 698 S.W.2d 766 (Tex. App.—Austin 1985, writ

of error granted) 29 Tex. Sup. Ct. J. 390 (May 28, 1986). Rather than staying its decision or certifying the question to the Texas Supreme Court,[7] the court of appeals reached out to decide the question of state law currently pending resolution before the Texas Supreme Court in a case involving the precise question presented in the case at bar.[8] Petitioners submit that this action violates fundamental principles of federalism as dictated by the United States Constitution, the McCarran Act and the decisions of this Honorable Court. Further, the court of appeals has disrupted the development of state law by denying the state's highest court the opportunity to resolve the conflicting authorities from its intermediate appellate courts, particularly since that state's highest court is currently reviewing the precise issue at bar.

"A proper respect for state functions" has caused this Honorable Court to recognize that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris,* 401 U.S. 37, 44 (1971). The same principle is embodied in the Ninth and Tenth Amendments to the United States Constitution,[9] establishing the essence of our federal system of government.

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7. Texas Constitution Art. V § 3-c(a) Vernon Ann. Tex. Const. (1986).

8. *Chitsey v. National Lloyds Insurance Company,* 698 S.W.2d 766 (Tex. App.—Austin 1985, Writ of Error granted), 29 Tex. Sup. Ct. J. 390 (May 28, 1986), was cited by Lexington and the court of appeals for the proposition that Texas law does not provide a private cause of action for treble damages under Art. 21.21 § 16 for unfair claim settlement practices.

9. Amendment IX of the Constitution of the United States in pertinent part provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Amendment X of the Constitution of the

Nowhere is the importance of federalism felt more strongly than in the area of insurance law where Congress and this Court have expressly provided that "the continued regulation and taxation by the several states of the business of insurance is in the public interest. . . ." 15 U.S.C. § 1011; *Wilburn Boat v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 319 (1955).

This admiralty case presents the precise situation addressed by this Honorable Court in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), in which the Court stated that the last word on the interpretition of the Texas statute "belongs neither to us nor to the district court but to the Supreme Court of Texas." 312 U.S. at 500. The court of appeals rendered a decision which is contrary to two decisions of the Texas Supreme Court on the subject, neither of which was cited by the court of appeals.[10] Rather, it was based on an intermediate appellate court's opinion which the Texas Supreme Court is currently reviewing.[11]

United States in pertinent part provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people."

10. *Royal Globe Insurance Company v. Bar Consulants, Inc.*, 577 S.W.2d 688 (Tex. 1979), wherein the Texas Supreme Court permitted the recovery of treble damages under Art. 21.21 § 16 against a property insurer for violations of Tex. Ins. Board Order 18663. Board Order 18663 which was at issue in that case involved the identical violation as the instant action. *Mayo v. John Hancock Mutual Life Insurance Company of Boston, Mass.*, 711 S.W.2d 5 (Tex. 1986), wherein the Texas Supreme Court again held that Art. 21.21 § 16 allows a private cause of action for treble damages against an insurer engaging in unfair practices in the handling of a claim prohibited by the Texas Insurance Board Order rules and regulations.

11. *Chitsey v. National Lloyds Insurance Company*, 698 S.W.2d 766 (Tex. App.—Austin 1985, Writ of Error granted), 29 Tex. Sup. Ct. J. 390 (May 28, 1986).

If the Texas Supreme Court follows its earlier decisions on this issue, to paraphrase the *Pullman* opinion, the "unnecessary ruling" of the court of appeals will be "supplanted by a controlling decision of a state court," and "the reign of law" will be "hardly promoted." *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 500 (1941).

Besides the unconstitutional interference in the development of state law, the attempt to decide questions of state law currently pending resolution before a state's highest court can lead to the embarassment of the federal judicial system as explained by Chief Judge Brown of the court of appeals:

> It has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding. But more important than possible embarrassment is the frustration for litigants when the rule of law we prescribe turns out to be a ticket for one ride only.[12]

Rather than subjecting the federal courts to the potential embarrassment of wrongly divining state law questions which are pending resolution before the state's highest court, the federal courts should stay this decision until the Texas Supreme Court has developed its state law in an orderly fashion or certify the question to the Texas Supreme Court. Not only does this avoid unnecessary interference with constitutionally protected state law development, but it avoids prejudice to litigants when the incorrect prediction "turns out to be a ticket for one ride only."[13]

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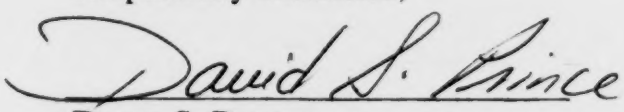
12. Brown, Certification—Federalism in Action, 7 CUMBERLAND L. REV. 455, 456 (1977).

13. *Id.*, 456.

CONCLUSION

The decision of the court of appeals is an affront to the principles of federalism set forth in the United States Constitution, enunciated by this Honorable Court and enacted into law by Congress. Equally important, however, is the impact that the opinion of the court of appeals could have by its unconstitutional interference with the development of insurance law in the State of Texas. For the reasons that are set forth above, Petitioners respectfully pray that this Honorable Court should grant this petition for a writ of certiorari to consider the questions of exceptional importance involved in this appeal.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2462

OPINION

JIM AUSTIN AND AULEMIC, INC.,
Plaintiffs-Appellees,

v.

SERVAC SHIPPING LINE,
HASSAN A. GAAFAR, IND., AND
LEXINGTON INSURANCE CO.,
Defendants,

LEXINGTON INSURANCE CO.,
Defendant-Appellant.

Filed July 2, 1986

Before: Charles Clark, Chief Judge, E. Grady Jolly and Robert M. Hill, Circuit Judges.

Opinion by Judge Robert M. Hill

Appeal from the United States District Court
for the Eastern District of Texas
Joe J. Fisher, District Judge, Presiding

SUMMARY

Admiralty/Insurance/Damages

Appeal from a district court judgment awarding compensatory, consequential and punitive damages. Affirmed in part, reversed in part and remanded.

Appellee Austin and his wholly owned corporation (collectively Austin) purchased a ship. Thereafter, Austin agreed to a short-term charter party with Servac Shipping Line, Ltd. and its principal (collectively Servac) so that Servac could evaluate the suitability of the ship for its long-term charter needs. Austin obtained a marine hull insurance policy with appellant Lexington Insurance Company (Lexington). During the short-term charter party, the ship suffered mechanical problems and Austin requested coverage from Lexington. Lexington initially rejected the claim, but later undertook a determination of the amount of damages. A year later the parties still could not agree on the cost to repair the ship. Austin filed suit against Lexington, seeking recovery of losses to the ship, lost profits, other consequential damages, and treble damages under the Texas Insurance Code, and also seeking the return of certain layup premiums. The district court entered judgment against Lexington for various damages. On appeal, Lexington offers arguments for reversing the entire judgment, as well as arguments for reducing the amount of damages awarded.

[1] Lexington's first argument for reversal is that alleged misrepresentations made by the insured voided the policy. [2] Lexington claims that Austin's maritime experience was misrepresented. [3] However, the district court's finding that no material misrepresentation occurred is not clearly erroneous. Based on the testimony before it, the court easily could have decided that the correct information was provided but that Lexington's underwriting agent had somehow confused it. [4] Lexington next contends that the policy was void because Austin allowed the ship to sail in an unseaworthy condition. [5] Although the record contains testimony supporting

Lexington's contention that mechanical deficiencies and the incompetence of the crew rendered the ship unseaworthy, it also contains testimony to the opposite effect, the latter amply supporting the district court's finding that the ship was not unseaworthy. [6] As to the cost to repair he ship, the district court selected the figure suggested by Austin's expert; Lexington urges the figure suggested by its expert because he allegedly prepared a more detailed and careful report. However, the credibility judgments Lexington asks on appeal are exactly the judgments that are properly made by the district court. [7] Lexington also argues that applying only one deductible amount to the costs of repairs was error. [8] Because two separate accidents occurred, the district court did err in applying only one deductible, and the recoverable cost of repairs is reduced accordingly. [9] Lexington next attacks the award of layup premiums. The policy provides that the insurance company would return the premiums applicable to each period of thirty consecutive days the vessel was laid up. Although laid up for four consecutive thirty-day periods in Spain, Lexington argues that since it did not approve the layup in Spain, Austin is not entitled to layup premiums. [10] However, the policy is ambiguous as to the necessity of obtaining Lexington's approval, and consequently the ambiguity was properly construed against the insurer. [11] Although Lexington next contends that the district court erred in finding that crew negligence caused the damage to the ship, [12] the expert testimony was conflicting, and the finding that crew negligence caused the damage is entirely plausible. [13] Lexington next argues that the district court erred in finding that its actions caused Austin to suffer the loss of a future, long-term charter party. [14] Although Servac made an offer for a thirty-month charter

of the vessel, no evidence in the record indicates that Austin accepted the offer. Because there are several plausible reasons for Austin's and Servac's failure to agree to a long-term charter party that have nothing to do with Lexington, that element of damages is reversed. [15] Lexington's next contention is that the district court erred in awarding Austin consequential damages for crew wages, port fees, inspections, and other costs incurred while Austin sought repair approval for the ship. [16] While ample evidence indicates that Austin incurred these expenses, no testimony indicates that they would not have been incurred had Lexington promptly determined coverage and paid for the repairs. Thus, this element of the damage award is also reversed. [17] Lexington's final argument is that the district court erred in applying the treble damages provision of the Texas Insurance Code. [18] Since the district court entered judgment, two Texas courts have held that section of the Code did not provide the insured a cause of action for unfair claims settlement practices. [19] Two federal courts sitting in Texas have held the same. Consequently, the district court erred in awarding treble damages under that section of the Code. [20] If Florida rather than Texas law applies to the instant case, the district court would still be in error in awarding the treble damages because Florida law does not permit such a recovery either.

OPINION

ROBERT M. HILL, Circuit Judge:

Defendant Lexington Insurance Company (Lexington) appeals a judgment entered against it following a bench trial. Lexington presents several arguments calling for a

complete reversal and the entry of a take-nothing judgment and several additional alternative arguments calling for a reduction of the damages assessed against it. While we reject the arguments calling for a complete reversal, we accept several of the damage reduction arguments and therefore order the damages reduced accordingly.

I. BACKGROUND

Plaintiffs Jim Austin and his wholly owned corporation, Aulemic, Inc., (collectively Austin) purchased the AMAZON TRADER, a refrigerated freight ship, at a United States Marshal's auction in December 1981 for $125,000. After completing some repair and maintenance work, Austin agreed to a short-term charter party with Servac Shipping Line, Ltd. and its principal, Hassan Gaafar, (collectively Servac) so that Servac could evaluate the suitability of the vessel for its long-term charter needs. Austin obtained a $1,000,000 marine hull insurance policy with Lexington covering the AMAZON TRADER. During the period the policy was in force, pursuant to the short-term charter party, the AMAZON TRADER carried a Servac cargo from Tampa, Florida, to Alexandria, Egypt.

While enroute from Tampa to Alexandria, the ship suffered engine, power train, and generator problems. Austin, through its agent Frank B. Hall & Co. (Hall & Co.), an insurance broker, contacted Lexington about the ship's mechanical problems and requested coverage. Lexington initially rejected the claim as occurring outside the vessel's trading warranty, which included only the Western Hemisphere, but Lexington later undertook a determination of the amount of the damages. One year after the claim arose the parties still could not agree on

the cost to repair the vessel; consequently, Austin brought suit against Lexington, alleging failure to pay claims arising under the policy, seeking recovery of losses covered by the policy, lost profits, other consequential damages, and treble damages under article 21.21 of the Texas Insurance Code, Tex. Ins. Code Ann. art. 21.21 (Vernon 1981), and seeking the return of layup premiums.[1]

The district court, sitting in admiralty without a jury, entered judgment against Lexington in the amount of $367,592 for amounts owed under the policy,[2] plus prejudgment and post-judgment interest, and $2,582,547 in punitive damages[3] under article 21.21, plus costs, post-judgment interest, and stipulated attorney's fees. This appeal followed.

II. LEXINGTON'S CONTENTIONS

Lexington levels numerous attacks on the judgment entered by the district court. Lexington first offers two arguments for reversing the entire judgment: (1) the alleged misrepresentations made by the insured voided the policy, and (2) the alleged unseaworthiness of the vessel voided the policy. Lexington next offers several arguments for reducing the amount of the damages

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1. Austin also sued Servac and Gaafar, alleging breaches of the charter party and seeking actual and consequential damages. The district court entered a take-nothing judgment in favor of Servac and Gaafar. Austin has not appealed the district court's ruling.

2. The amount owed under the policy consisted of the $373,600 cost to repair the vessel, less a $12,500 deductible, plus the return of $6,492 in layup premiums, for a total of $367,592.

3. The punitive damages consisted of the $373,600 cost to repair the vessel, less the $12,500 deductible, plus $390,000 for lost future profits, plus $109,749 of other expenses, for a total of $860,849. The district court then trebled this amount to arrive at a figure of $2,582,547.

awarded against it because the district court erred: (1) in determining the cost to repair the vessel, (2) in subtracting only one deductible amount from the cost to repair, (3) in awarding layup premiums, (4) in determining that crew negligence caused all the losses, (5) in determining that Lexington's actions caused Austin to lose a future charter party agreement, (6) in determining other consequential damages incurred by Austin, and (7) in applying the punitive provisions of article 21.21 of the Texas Insurance Code.

III. LEXINGTON'S LIABILITY

A. *Misrepresentation*

[1] Lexington's first argument for reversal is that the district court erred in finding that the alleged misrepresentations made by the insured did not void the policy.

> Nothing is better established in the law of *marine* insurance than that "a mistake or commission material to a marine risk, whether it be wilful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy. And the same rule obtains, even though the insured did not suppose the fact to be material."

Fireman's Fund Insurance Co. v. Wilburn Boat Co., 300 F.2d 631, 646 (5th Cir.), *cert. denied*, 370 U.S. 925, 82 S. Ct. 1562, 8 L.Ed.2d 505 (1962) (emphasis in original) (citation omitted); *see also Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974, 980 (5th Cir. 1969). "A material fact is any fact, 'the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance.' " 300 F.2d at 640 (citations omitted).

[2] Lexington claims that Hall & Co., Austin's broker, misrepresented Austin's maritime experience by stating that Austin had owned and operated the AMAZON TRADER for twelve years, that Austin owned numerous other maritime interests including twenty fishing vessels, and that Austin was contemplating the purchase of two new vessels, when in fact Austin had just purchased the AMAZON TRADER, had previously owned only one other vessel, an oilfield supply boat, and was not contemplating the purchase of additional vessels. Lexington further claims that the alleged misrepresentations were material to its determination of the risk.

Lexington cites the testimony of one witness, Niels Aaskov, an employee of Lexington's underwriting agent, Southeastern Risk Specialists, to support its contentions. Aaskov testified, based on a worksheet prepared at the time, that an employee of Hall & Co., Frank Sioli, informed him that the owner of the AMAZON TRADER had owned and operated the vessel for twelve years, that the owner owned numerous other vessels, and that the owner was contemplating the purchase of two other vessels. Later, on cross-examination, Aaskov testified that, in addition to gathering information on the current owner, he also compiled information concerning the previous owner. The previous owner of the vessel, Hines Worbs, had operated the vessel for twelve years, owned numerous other vessels, and was contemplating the purchase of two new vessels.

The district court also had before it the testimony of several other witnesses concerning the alleged misrepresentations. Sioli, the agent who contacted Aaskov concerning coverage for the AMAZON TRADER, testified

that he met with Austin before contacting Aaskov and that he knew Austin owned the vessel. He further testified that he knew that the previous owner had not retained any ownership interest or managerial involvement with the vessel and that nothing in Hall & Co's files reflected that Sioli ever told Aaskov otherwise, Austin also testified that he told Sioli and the president of Hall & Co. that he owned the vessel. Furthermore, Lexington issued the policy to: "Aulemic, Inc. and Mr. James D. Austin, c/o Mr. James D. Austin."

[3] We do not believe the district court's finding that no material misrepresentation occurred is clearly erroneous, *see* Fed. R. Civ. P. 52, as it is "plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 470 U.S. ____, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518, 528 (1985). Based on the testimony before it, the district court easily could have decided that Sioli provided Aaskov with the correct information and that Aaskov somehow confused the past owner's experience with the present owner's experience. Since the district court's finding is plausible, we cannot disturb it.[4]

B. *Seaworthiness*

[4] Lexington next contends that the policy was void from its inception because Austin allowed the vessel to sail in an unseaworthiness condition.

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4. Lexington further contends that the AMAZON TRADER was laid-up without a crew and was not operated under her own power from December 1980 to January 1982 and that Hall & Co. should have disclosed this fact to Lexington. Contrary to Lexington's contention, the evidence reveals that the vessel operated until March 12, 1981, when it was arrested for nonpayment of debt. The deck logs further reveal that the crew remained on board into April 1981. Thus, Lexington bases its contention on an incorrect premise.

> A warranty of seaworthiness by the owner is implied in every hull insurance policy unless expressly waived. The warranty is a continuing obligation that "the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthiness condition. . . . The consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness."

Insurance Co. of North America v. Board of Commissioners, 733 F.2d 1161, 1165 (5th Cir. 1984) (citations omitted); *see also D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.,* 608 F.2d 145, 147 (5th Cir. 1979), *cert. denied,* 449 U.S. 830, 101 S. Ct. 97, 66 L.Ed.2d 35 (1980); *Saskatchewan Government Insurance Office v. Spot Pack, Inc.,* 242 F.2d 385, 388 (5th Cir. 1957). The law presumes that every vessel is seaworthy until the contrary is proved, and the burden of proving unseaworthiness lies with the insurance company. *Hanover Fire Insurance Co. v. Holcombe,* 223 F.2d 844, 845-46 (5th Cir.), *cert. denied,* 350 U.S. 895, 76 S. Ct. 154, 100 L.Ed. 787 (1955).

[5] Lexington contends that the AMAZON TRADER was unseaworthy in two respects: (1) various mechanical deficiencies rendered the vessel unseaworthy and (2) the incompetence of the crew rendered the vessel unseaworthy. Lexington relies on the testimony of two expert witnesses to the effect that the vessel was unseaworthy due both to mechanical deficiencies and crew incompetence; however, the record also contains testimony to the opposite effect. At least five witnesses attested to the seaworthiness of the vessel, and one expert witness testified that the entire crew was competent. Since ample testimony supported

the district court's finding that the vessel was not unseaworthy, the district court's finding is clearly plausible in light of the evidence, and we therefore refuse to set aside its finding. *See* Fed. R. Civ. P. 52; *Anderson v. City of Bessemer City,* 470 U.S. at ____, 105 S. Ct. at 1512, 84 L.Ed.2d at 528; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 746, 766 (1948).

IV. AMOUNT OF DAMAGES

A. *Repair Costs*

[6] Lexington contends that the district court erred in determining the cost to repair the vessel. The district court selected the figure suggested by Austin's expert, $373,600, and awarded Austin that amount less the $12,500 deductible. Lexington urges us to reject the figure accepted by the district court and to accept the figure suggested by Lexington's expert, $45,851. Lexington would have us overturn the district court's finding because Lexington's expert allegedly prepared a more "detailed" and "careful" report than did Austin's expert and because Austin's expert's report is "ephemeral in the extreme and inherently suspect." The district court observed both experts at trial and heard each expert's explanation of how he arrived at the figures used in the reports. The credibility judgments Lexington asks us to make are exactly the judgments that the Federal Rules of Civil Procedure leave for the district court to make. Fed. R. Civ. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *Anderson v. City of Bessemer City,* 470 U.S. at ____, 105 S. Ct. 1504, 84 L.Ed.2d at 518 ("[w]hen findings are based on determinations regarding the credibility of

witnesses, Rule 52 demands even greater deference to the trial court's findings"). We therefore refuse to disturb the district court's factual finding as to the cost to repair the vessel.

B. *Deductible Amount*

[7] In addition to arguing that the district court erred in computing the cost to repair the vessel, Lexington also argues that the district court erred in applying only one deductible amount to the costs of repairs. The policy provides: "[T]here shall be deducted from the aggregate of all claims . . . arising out of each separate accident, the sum of $12,500. . . ." Austin maintains that the district court correctly applied only one deductible because only one accident occurred, i.e., the captain's negligence in operating the vessel. Two decisions of the captain caused the damage to vessel: first, when the clutch began slipping, the captain ordered the clutch welded in the engaged position, resulting in damage to the engine and the power train, second, after discovering that the fuel used in the generators was contaminated, the captain allowed the crew to continue using the contaminated fuel in the generators, resulting in damage to the generators.

Lexington urged the district court and now urges this court to apply a separate deductible to each item of equipment damaged by the captain's negligence. For example, Lexington would apply a separate deductible to each of the generators damaged by the contaminated fuel, although the captain's one act of negligence in ordering the use of contaminated fuel damaged all the generators, and would apply separate deductibles to the engine, the clutch, and the tailshaft, although the captain's one act

of negligence in ordering the clutch welded caused the damage to all three of these items.

[8] While we cannot agree with Lexington's contention that up to ten deductibles should apply to Austin's claim, we do agree that the district court erred in applying only one deductible. The court should have applied the deductible twice since two separate accidents occurred. The first occurred when the captain decided to order the clutch welded, and the second occurred when the captain decided to allow the crew to continue using contaminated fuel in the generators. We therefore modify the recoverable cost of repairs by reducing it an additional $12,500 to $348,600.

C. *Layup Premiums*

[9] Lexington next attacks the district court's award of layup premiums to Austin. The policy provides that the insurance company would return the premiums applicable to each period of thirty consecutive days the vessel was laid up. The AMAZON TRADER was laid up for four consecutive thirty-day periods in Spain when it broke down on its way back to Tampa; however, when Austin requested return of the applicable premiums, Lexington refused to return them. Lexington argues that Austin violated the following provision of the policy: "[I]n no case shall a return for lay-up be allowed when the Vessel is lying . . . in any location not approved by the Underwriters." Lexington argues that since Lexington did not approve the layup in Spain, Austin is not entitled to lay up premiums. We disagree.

[10] The policy does not say that Lexington must first approve a layup port; rather, the policy says that

layup premiums will not be allowed when the vessel is laid up in a location "not approved by the Underwriters." This ambiguous phrase could easily be construed as meaning that Lexington maintained a list of unapproved ports and that the vessel could not be laid up at one of those ports. Applying the time-honored rule that ambiguities in insurance policies are to be construed against the insurer, *Walter v. Marine Office of America,* 537 F.2d 89, 94-95 (5th Cir. 1976), we hold that the district court correctly determined that Austin was entitled to layup premiums.

D. *Crew Negligence*

[11] Returning to its wholesale attack on the factual findings made by the district court, Lexington next contends that the district court erred in finding that crew negligence caused the damage to the AMAZON TRADER. This finding was critical to the district court's award of damages for the cost of repairs because the court relied only on the Inchmaree clause of the insurance policy in awarding damages. The Inchmaree clause covers damage to the vessel caused by the negligence of the master, officers, crew, or pilots. Thus, if the damage to the vessel was not the result of crew negligence, the Inchmaree clause does not provide coverage.

[12] Lexington again urges us to accept the version of the facts as related by its expert rather than the version related by Austin's expert and accepted by the district court. Again we must decline. Austin's expert testified that the captain of the vessel was negligent in ordering the clutch welded into a solid unit and in continuing to operate the generators with contaminated fuel. Thus, the district court's finding that crew negligence caused the dam-

age to the vessel is entirely plausible and must be upheld on appeal.

E. *Future Charter*

[13] Lexington next argues that the district court erred in finding that Lexington's actions caused Austin to suffer $390,000 in damages for the loss of a future charter party. The district court found that, under the proposed thirty-month charter party, Austin would have earned a profit of $13,000 a month, resulting in a $390,000 loss when Servac retracted the offer. Lexington argues that its actions did not cause Servac to retract the offer. We agree.

[14] On July 8, 1982, while the AMAZON TRADER was enroute from Tampa to Alexandria, Servac made an offer for a thirty-month charter of the vessel. No evidence in the record indicates that Austin accepted Servac's offer. In early August, before Servac had any knowledge of Lexington's handling of the claim, Servac decided to have nothing more to do with the AMAZON TRADER. Our review of the evidence indicates that, while there are several plausible reasons for Austin's and Servac's failure to agree to a long-term charter party, i.e., mechanical problems with the vessel, delays in the vessel's return voyage, and disputes over whether Servac or Austin was responsible for repairs, none of the explanations have anything to do with Lexington. Thus, finding ourselves left with a definite and firm conviction that a mistake has been made and finding the district court's finding implausible in light of the evidence, we reverse as to this element of damages.

E. *Other Consequential Damages*

[15] Lexington's next contention is that the district court erred in awarding Austin $109,749 in other consequential damages. The damages consisted of Austin's expenses for crew wages, port fees, inspections, and other costs incurred while Austin sought repair approval for the vessel.

[16] While ample testimony and documentation support the district court's finding that Austin incurred these expenses, the evidence fails to connect the expenses with Lexington's actions. No testimony indicated that Austin would not have incurred these expenses had Lexington promptly determined coverage and paid for the repairs. When substantial evidence does not support a finding of the district court, we may set that finding aside as clearly erroneous. *United States v. Florida,* 482 F.2d 205, 208 (5th Cir. 1973); *Ward v. Hobart Manufacturing Co.,* 450 F.2d 1176, 1182-83 (5th Cir. 1971). Since no evidence was introduced to show that Lexington's conduct caused Austin to incur the expenses, the district court's finding is clearly erroneous, and we reverse this element of the damage award.[5]

F. *Treble Damages*

[17] Lexington's final argument is that the district court erred in concluding that it could apply the treble

5. While Austin did not introduce evidence to connect Lexington to the expenses Austin incurred while the vessel was laid up, some of Austin's testimony is relevant to the inquiry. Jim Austin testified that, had Lexington promptly agreed to pay for the needed repairs, these would have incurred approximately $125,000 in expenses for maintaining the crew and vessel while repairs were being made and for bringing the vessel back across the Atlantic. Thus, Austin, according to its own evidence, incurred less expense by Lexington's delay than would have been incurred had Lexington promptly paid for the repairs.

damages provision or article 21.21 of the Texas Insurance Code, Tex. Ins. Code Ann. art. 21.21 § 16 (Vernon 1981).[6] The district court held that the insurance policy was issued to and was payable to Texas plaintiffs and was

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6. At the time of trial and at the time the alleged unfair settlement practices occurred, the pertinent part of article 21.21 read as follows:

> Sec. 16(a) Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.
>
> (b) In a suit filed under this section, any plaintiff who prevails many obtain:
>
> (1) three times the amount of actual damages plus court costs and attorney's fees reasonable in relation to the amount of work expended;
>
> (2) an order enjoining such acts or failure to act;
>
> (3) any other relief which the court deems proper.

(Vernon 1981). Between the time of trial and the time the district court entered judgment, the Texas Legislature altered article 21.21 to read as follows:

> Sec. 16. (a) Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.
>
> (b) In a suit filed under this section, any plaintiff who prevails may obtain:
>
> (1) the amount of actual damages plus court costs and reasonable and necessary attorneys' fees. If the trier of fact finds that the defendant knowingly committed the acts complained of, the court shall award, in addition, two times the amount of actual damages; or
>
> (2) an order enjoining such acts or failure to act; or
>
> (3) any other relief which the court deems proper.

(Vernon Supp. 1986).

therefore subject to the provisions of the Texas Insurance Code. *See* Tex. Ins. Code Ann. art. 21.42 (Vernon 1981). Lexington argues, first, that the court should have applied a federal rule to answer the question of whether treble damages are available and, second, that, if state law does apply, the court should have applied Florida rather than Texas law. Austin maintains that Texas law applies.

We begin our choice of law analysis with *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L.Ed. 337 (1955). *Wilburn Boat* teaches that, in the absence of a controlling federal admiralty rule, we are to turn to state law. *Id.* at 314-16, 99 L.Ed. at 342-44. *Wilburn Boat,* however, does not address the question of which state's law to apply.

Applying *Wilburn Boat,* we turn to the question of whether a controlling federal admiralty rule answers the question raised by the district court's award of treble damages. The question raised is whether, when an insurance company "engage[s] in unfair and deceptive acts or practices" in the handling of its claims, may a district court award the insured three times his damages. Our review of admiralty law has not revealed, nor have the parties cited, any federal rule controlling the damages recoverable by an insured allegedly injured by the insurer's unfair acts in the handling of a claim.[7] In the absence of a controlling federal rule, we must turn to

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7. While Lexington now claims that such a rule exists, Lexington is unable to cite a single case containing a federal rule on the subject. Interestingly, Lexington's Proposed Conclusions of Law filed in the district court contain the following statement: "Any question of unfair or inequitable claims handling is a matter of state law, there being no clearly established rule of federal jurisprudence on the subject."

state law for the answer to the question of whether an insured may recover treble damages for unfair claims handling practices.

Lexington strongly urges the application of Florida law to the case, while Austin maintains that Texas law applies. We find it unnecessary to determine whether Texas or Florida law applies, since the result is the same under each state's law. Neither Texas nor Florida permits the recovery of treble damages under the facts of the instant case.

[18] At the time the district court concluded that article 21.21 permitted Austin to recover treble damages, no Texas court had decided whether article 21.21 applied to a property insurer who failed to fairly handle a claim made by his insured. However, since the district court entered judgment, two Texas Courts of Appeal have addressed situations identical to those in the present case. In both cases the plaintiff-insured alleged that the defendant-insurer engaged in unfair claims settlement practices, and in both cases the Texas courts held that article 21.21 did not provide the insured a cause of action for unfair claims settlement practices.

In *Texas Farm Bureau Mutual Insurance Co. v. Vail,* 695 S.W.2d 692 (Tex. App.—Dallas 1985, no writ) following the insurance company's denial of the insureds' fire loss claim, the insureds recovered treble damages based on their allegations of unfair claims settlement practices. The court of appeals, in holding that article 21.21 did not permit the insured to recover damages, stated that " 'it was the intent of the legislature to "seal off" unfair claims settlements from the expansive language of the DTPA and the Insurance Code.' " *Id.* at

694 (citation omitted). In *Chitsey v. National Lloyd's Insurance Co.*, 698 S.W.2d 766 (Tex. App.—Austin 1985, writ of error granted), the jury found, in answer to a special issue, that the insurer engaged in an unfair act or practice in its handling of the insured's claim. The court of appeals held that the jury's finding did not entitle the insured to recover treble damages because article 21.21 did not apply to unfair claims settlement practices.[8]

[19] Two federal district courts sitting in Texas have also held that article 21.21 does not provide the insured a cause of action for unfair claims settlement practices against property insurers. *Lexington Insurance Co. v. Bennet Evans Grain Co.*, No. C.A. G-84-184 (S.D. Tex. Feb. 17, 1986); *South Texas National Bank of Laredo v. United States Fire Insurance Co.*, No. C.A. L-83-34 (S.D. Tex. Jan. 10, 1985). Thus, if Texas law applies to the instant case, the district court erred in awarding treble damages to Austin.

[20] Similarly, Florida law does not provide the insured with a cause of action for treble damages if the insurance company engages in unfair claims settlement

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8. Austin argues that the decisions of the Texas Court of Appeals, rather than reaching consistent decisions on the applicability of section 21.21 to unfair claims settlement cases, are split. Austin cites two cases for this proposition. *Allstate Insurance Co. v. Kelly*, 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *St. Paul Insurance Co. v. McPeak*, 641 S.W.2d 284 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). As the court in *Vail* noted, the duties and responsibilities of a property insurer differ from those of other types of insurance providers. *Vail*, 695 S.W.2d at 694. In *Kelly* the insured brought suit for the insurer's handling of a suit brought by a third party against the insured. In *McPeak* the insured brought suit after the insurer terminated his worker's compensation benefits. Since *Kelly* and *McPeak* are distinguishable from *Vail* and *Chitsey*, both property cases, the Texas cases addressing unfair claims settlements in a property damage context are consistent.

practices. By statute, Florida law prohibits unfair practices, Fla. Stat. Ann. § 626.9521 (West 1984), and specifically provides that unfair claims practices are one type of unfair practice, Fla. Stat. Ann. § 626.954(i). The section prohibiting unfair practices, section 626.9521, provides that the violator shall be subject to penalties provided in section 627.381, which in turn provides for administrative fines and license suspensions, but does not provide for recovery of treble damages. Fla. Stat. Ann. § 627.381 (West 1984). Thus, if Florida rather than Texas law applies to the instant case, the district court would still be in error in awarding Austin treble damages. Since neither Texas nor Florida law permits the recovery of treble damages from an insurer who engages in unfair claims settlement practices, we reverse the portion of the district court's judgment awarding Austin treble damages.[9]

IV. CONCLUSION

We affirm the portion of the district court's judgment awarding Austin $361,100 as his costs of repairs; however, we modify that amount by subtracting an additional deductible of $12,500, leaving a recoverable cost of repairs of $348,600. We also affirm the portion of the judgment awarding Austin layup premiums in the amount of $6,492. We reverse all the remaining portions of the judgment awarding damages against Lexington. We remand the case to the district court with instructions to enter judgment for Austin in the amount of $355,092,

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9. Lexington also argues that the district court's factual findings regarding Lexington's resolution of Austin's claim are clearly erroneous. In light of our holding that Austin is not entitled to excess damages for unfair claims settlement practices, if any, we need not reach this contention.

plus attorney's fees, costs, and pre-and post-judgment interest.[10]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

10. The district court awarded Austin attorney's fees in amounts stipulated to by the parties. Lexington has not appealed this portion of the district court's judgment; therefore, the district court should include the stipulated amount of attorney's fees for the trial and appeal in the new judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-83-436-CA

JIM AUSTIN and AULEMIC, INC.

v.

SERVAC SHIPPING LINE, LTD.,
HASSAN A. GAAFAR, INDIVIDUALLY
AND LEXINGTON INSURANCE COMPANY

(Filed June 6, 1985)

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MEMORANDUM OPINION

Plaintiffs, JIM AUSTIN and AULEMIC, INC., brought this admiralty suit against LEXINGTON INSURANCE COMPANY to recover for the loss of their vessel, the M/V Amazon Trader, which was insured under an American Institute Time Hull Policy issued by Lexington. Plaintiffs also sought statutory penalties for unfair claims handling practices in violation of TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).

Plaintiffs sued SERVAC SHIPPING LINE, LTD. and HASSAN A. GAAFAR, Individually, to recover for the breach of a charter party for the M/V Amazon Trader. Servac Shipping Line, Ltd. counterclaimed against Jim Austin, individually, for breach of the same agreement.

Both the charter party and insurance policy are maritime contracts within the admiralty jurisdiction of the

Court. Because the charter and insurance contracts were both Texas contracts which were to be performed in whole or in part by the parties in Texas, the Court has *in personam* jurisdiction of the Defendants. Lexington's policy of insurance was issued to and is payable to Plaintiffs in Beaumont, Texas. The policy was, therefore, a Texas contract per Tex. Insur. Code Ann. art. 21.42 (Vernon 1981). The charter party was received and signed by Austin in Beaumont, Texas. Under the charter, Austin paid the monthly mortgage payments on the vessel to the Parkdale Bank in Beaumont. Servac was required to and Gaafar did report to Austin in Beaumont on the vessel's performance and made an offer for a long-term charter. The Court concludes that the Defendants were "doing business" in the state of Texas, within the meaning of art. 2031(b), Tex. Rev. Civ. Stat. Ann. (Vernon 1964 and Supp. 1985).

The parties tried the case to the Court, sitting in admiralty. The Court heard the testimony of nineteen (19) witnesses, both live and by deposition. In addition, all parties submitted extensive pre-trial and post-trial briefs.

After careful review of the evidence, the Court finds and concludes that at all material times prior to June 16, 1982, the M/V Amazon Trader was seaworthy and reasonably fit for its intended use; that the damage to the vessel was caused by the negligence of the master and crew, which peril was insured under the insurance policy; and that Lexington Insurance Company has engaged in "unfair and deceptive acts or practices" in the handling of Plaintiffs' claims in violation of TEX. INS. CODE ANN. art. 21.21. Consequently, judgment will be

entered for Plaintiffs against Lexington Insurance Company.

The Court further concludes that Plaintiffs should take nothing by reason of their suit against Servac Shipping Line, Ltd. and Hassan A. Gaafar, and that Servac Shipping Line, Ltd. take nothing by reason of its counterclaim against Jim Austin.

A. THE VESSEL

Jim Austin is the sole owner of Aulemic, Inc., a Cayman corporation having its principal place of business in Beaumont, Texas. Aulemic, Inc. bought the M/V Amazon Trader in December 1981. Aulemic had the vessel surveyed and refurbished, spending in excess of $200,000 to make it fit for transoceanic refrigerated cargo voyages. Extensive surveys by at least three marine surveyors found the vessel fit for duty and it was so certified. Among other things, the surveyors inspected certain of the devices which later failed at sea from misuse.

B. THE CHARTER PARTY

In early May 1982, Hassan Gaafar, President of Servac, contacted Austin at his residence in Beaumont, Texas for the purpose of chartering the vessel to carry frozen cargo to Alexandria, Egypt from Tampa, Florida. Austin and Gaafar agreed to enter into a charter party and on June 2, 1982, Austin, on behalf of Aulemic, received and signed in Beaumont a charter party with Servac. Performance of the parties' obligations under the charter agreement was guaranteed by both Austin and Gaafar in their individual capacities.

In that charter party, Austin did not charge a freight rate or hire for use of the vessel. Instead, Austin entered the charter party so Servac could evaluate the vessel in anticipation of entering into a long-term charter. Under the charter party, Servac agreed to pay all expenses of the vessel during the charter from June 1st until the vessel returned to Tampa.

C. THE INSURANCE POLICY

Plaintiffs' insurance broker, Frank B. Hall & Co. of Florida, placed hull insurance on the Amazon Trader on February 10, 1982 with Lexington Insurance Company. Lexington's policy of marine insurance was issued to Plaintiffs in Texas on July 1, 1982. Lexington insured Plaintiffs' vessel in the amount of $1,000,000 against loss and damage for the period from February 10, 1982 to February 10, 1983. Lexington had been instructed to name James D. Austin, the principal of Aulemic, Inc., as an additional insured and Parkdale Bank of Beaumont as mortgagee.

D. THE VOYAGE

On June 13, 1982, the Amazon Trader sailed from Tampa, with a master and crew hired by Austin, on a round-trip voyage to Alexandria, Egypt carrying the cargo of Servac: many tons of frozen turkeys. The captain, David Ashbee, was qualified to serve as master of the vessel. His nine crewmen were qualified in their jobs and the Amazon Trader was properly manned, equipped and supplied and reasonably fit for the voyage to Alexandria, Egypt.

Thrre days out of Tampa the captain stopped the vessel's engine to repair a slipping clutch. The vessel was then located approximately 70 to 80 miles off the east coast of Florida and within its trading warranty. The chief engineer gave the Captain two options: Either call a seatug to take her back to port for proper repairs, or weld the clutch into a solid unit.

Captain Ashbee made a serious error in judgment by ordering the chief engineer to weld the clutch into a solid unit without first consulting the owner. The welding of the clutch caused a misalignment of the vessel's main engine power train. The continued operation of the vessel in that condition resulted in extensive damage to the vessel's main engine, clutch, thrust-bearing and tail-shaft. In addition to the mechanical problems noted above, the vessel suffered a fire and its generators were damaged by contaminated fuel.

Ashbee knew the repairs to the clutch were temporary and that the chief engineer recommended proper repairs in the next available port. But he continued on to Alexandria because the Charterer's agent advised him "to continue to Egypt and in Egypt we'd have all the major repairs corrected when you discharge the cargo." Moreover, Gaafar gave Ashbee an arrival deadline before the vessel left Florida. The vessel arrived in Alexandria on July 15 and discharged its cargo.

Prior to the vessel's arrival in Alexandria, Plaintiffs received, in Beaumont, Servac's favorable evaluation of the vessel's performance and an offer for a long-term 30 month charter. Under this proposed charter party, Plaintiffs were to realize at least $13,000 a month clear net profit for the 30 months of the charter, resulting in

at least $390,000 profit from the long-term charter of the vessel to Servac.

Before addressing the dispute with Lexington, the Court will dispose of the cross claims of Austin and Gaafar and of their companies. Both Austin and Gaafar allege breaches of their charter party agreement by the other's company. The Court concludes that it was the intention of the parties that Servac pay all expenses, including repairs to the vessel, incurred in shipping its product to Egypt. That was simply the consideration for using the vessel.

Because Servac actually paid the expenses of the vessel during the charter, the Court concludes that Gaafar and Servac did not breach the charter party.

Servac's allegations that Plaintiffs failed to exercise due diligence and breached the implied warranty of seaworthiness are without merit. The damages Servac seeks from Austin in its counterclaim, by the admission of Servac's President, Gaafar, are either related to an earlier charter party for which Servac indemnified Aulemic or are expenses incurred in operating the vessel.

Maritime law permits parties to assume liabilities in contracts as they choose. *J.B. Effenson Co. v. Three Bays Corporation, Ltd.*, 238 F.2d 611 (5th Cir. 1956). The Court concludes that Servac's position is contrary to the plain reading of the contract and to Servac's earlier course of action. Accordingly, the Court holds there was no breach by Austin.

E. THE DAMAGE CLAIMS AND DENIALS

The balance of the lawsuit concerns the refusals of Lexington to pay claims under the marine insurance

policy and its liability to Austin for its failure to pay claims.

1. THE AUGUST 1982 DAMAGE CLAIM AND DENIAL

On August 3, 1982, Austin reported to Frank B. Hall & Co. two claims for main engine damage and a fire which occurred on the vessel while en route from Florida to Egypt. Frank B. Hall & Co. immediately notified Lexington of the two claims under the policy. The policy contained a trading warranty which insured the vessel only while within the Western Hemisphere. Lexington refused to pay, insisting that Aulemic breached that warranty and thereby voided the coverage.

The Court finds that all the damage to the Amazon Trader occurred in the Western Hemisphere and within the vessel's trading warranty. The Court further finds that Lexington failed to conduct a reasonable investigation under the circumstances and summarily denied both claims on August 4, 1982. Frank B. Hall & Co. advised Lexington on August 5, 1982 that the main engine damage occurred within the vessel's trading warranty, as stated in the policy, but Lexington continued to deny coverage and closed both claims files on August 23, 1982.

Among other perils insured by Lexington in the policy were those contained in the "Inchmaree" clause, which provides in part: "Subject to the conditions of this policy, this insurance also covers loss of or damage to the vessel directly caused by the following: Negligence of Masters, Officers, Crew or Pilots, provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the vessel,

or any of them." The Court finds and concludes that the damage to the Amazon Trader fell within the Inchmaree Clause of the insurance policy issued by Lexington.

2. THE OCTOBER 1982 DAMAGE CLAIM AND DENIAL

While in port in Alexandria, the Amazon Trader underwent repairs to a rear shaft bearing. Captain Ashbee knew the repairs were only temporary and that the vessel required major repairs to the main engine, clutch, thrust-bearing, tail-shaft and generators. In September, 1982, the vessel was moved to Malaga, Spain for complete repairs. Frank B. Hall & Co. again notified Lexington of Plaintiffs' claims. In October, 1982, Austin inspected the vessel with the owners of two similar vessels. The vessel owners estimated the reasonable cost of repairs to be $400,000. Frank B. Hall & Co. made demand in that amount on Lexington. Lexington continued to deny Plaintiffs' claims and failed to provide Plaintiffs a reasonable explanation of the basis in the policy, in law, or in fact for the denial of the claims.

3. THE FEBRUARY 1983 SURVEY AND DENIAL

In January, 1983, Plaintiffs employed a marine surveyor, Percy Overman, to conduct a damage survey. In his damage survey report, Overman concluded that the reasonable cost of repairs to the Amazon Trader was $373,600. Lexington's surveyor from the Salvage Association, John Riley, initially agreed the damage was caused by crew negligence and so stated in his survey report dated February 9, 1983. Despite this information, Lexington continued to deny Plaintiffs' claims and refused to approve a shipyard for repairs. In late February, 1983,

Lexington was advised that because Plaintiffs' claims were being denied, Plaintiffs would be forced to sell the vessel in its distressed condition. Plaintiffs sold the Amazon Trader, unrepaired, on April 12, 1983 for $30,000 in mitigation of their damage.

As a result of Lexington's failure to conduct a reasonable investigation and to properly and fairly handle the claims, Plaintiffs incurred $109,748.88 in expense for crew wages, port expenses, agents, inspections and costs while seeking repair approval from Lexington and prior to the sale of the vessel. In addition, Plaintiffs sustained $390,000 lost profits on the long-term 30 month charter of the vessel to Servac. The Court finds that Plaintiffs would have earned these profits, had Lexington authorized and paid for the necessary repairs on a timely basis.

F. COVERAGE UNDER THE POLICY

Lexington denies coverage of the Amazon Trader, claiming the vessel was unseaworthy at the attachment of the policy and upon its departure from Key West and Tampa because Plaintiffs failed to exercise due diligence to prepare the vessel; because the master and crew were unqualified; and because Plaintiffs misrepresented the nature of the risk insured.

The law presumes that every vessel is seaworthy until the contrary is proved, and the burden of proving that a vessel is unseaworthy lies upon the insurance company. *Hanover Fire Insurance Company v. Holcombe,* 233 F.2d 844 (5th Cir. 1955).

A shipowner's obligation under a hull policy is extremely limited. The vessel must be seaworthy at the attachment of the insurance, but henceforth, the sea-

worthiness obligation is a sort of negative warranty, i.e. the owner or those in privity with him must not fail to exercise due diligence and send the vessel to sea in a deficient condition. *Tropical Marine Products, Inc. v. Burmingham Fire Insurance Company,* 247 F.2d 116 (5th Cir. 1957), *cert. denied,* 355 U.S. 903 (1957).

A shipowner's warranty of seaworthiness is not that a vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage or before departure from each port during the policy term. *Saskatchewan Government Insurance Office v. Spotpack, Inc.,* 242 F.2d 385 (5th Cir. 1957).

Although the Inchmaree Clause of a hull policy refers to "due diligence" of the owner to keep the vessel seaworthy, it was not intended as a restriction of coverage, but was intended to broaden coverage in response to the practical business needs of the shipping world in the face of adverse court decisions. *Id.* at 391. *Tropical Marine Products, Inc. v. Burmingham Fire Insurance Company,* 247 F.2d at 122 (5th Cir. 1957). An Inchmaree Clause does in fact underwrite unseaworthiness of many types, such as that occasioned by the negligence of the master or that resulting from a latent defect in hull or machinery. *Id.* at 123.

The Court concludes that Plaintiffs exercised due diligence and that the Amazon Trader was in a seaworthy condition and reasonable fit for its intended use at all material times prior to June 16, 1982. The vessel was properly manned with a qualified master and crew. Contrary to Lexington's allegation that the nature of the risk was misrepresented, the Court concludes that Lexington knew who and what it was insuring. Lexington has failed

to sustain its burden on any contention to vitiate coverage. The Court finds therefore that the policy was in effect and provided coverage for the loss under the Inchmaree Clause. The damage to the Amazon Trader occurred in the Western Hemisphere and within the vessel's trading warranty. Plaintiffs are entitled to recover for all damage sustained by the vessel as a result of the master's and crew's negligence.

G. APPLICATION OF TEXAS LAW

The Supreme Court has ruled that state law should be applied in the field of marine insurance, at least where entrenched Federal precedent is lacking, with respect to a specific issue. *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 348 U.S. 310 (1962). As a Texas contract, the insurance policy is governed by Texas law, including all pertinent provisions of the Texas Insurance Code. Article 21.21, sec. 16 of the Code provides that a cause of action for treble damages may be brought by any person who has been "injured" by another's acts and conduct amounting to "unfair and deceptive acts or practices" in the business of insurance as declared in the lawfully promulgated rules and regulations of the State Board of Insurance. *Royal Globe Insurance Co. v. Bar Consultants,* 577 S.W.2d 688 (Tex. 1979).

Plaintiffs sought relief under Sec. 16 of art. 21.21 for violations of Insurance Board Order 41060 Sec. .003 and .003(b) and argued that Lexington "engaged in unfair and deceptive acts or practices" in the handling of its claims, in violation of Sec. 3(i) and 3(o) of Insurance Board Order 27085. Plaintiffs also argued that Lexington violated Insurance Board Order 41060 Sec. .004(4).

The Texas State Board of Insurance previously adopted Board orders which prohibited, *inter alia,* misrepresentation of an insurance policy and unfair claim settlement practices, the latter including failure to reasonably explain a claim's denial and refusal to pay claims absent a reasonable investigation. Board Orders 41060 (July 22, 1982), 27085 (May 17, 1974).

The Court concludes that Lexington has violated Insurance Board Order 41060 Sec. .003 by committing "unfair and deceptive acts or practices" in violation of Sec. 3(i) and 3(o) of Insurance Board Order 27085. Lexington's wrongful denial of Plaintiffs' claims on August 4, 1982 and thereafter was based its failure to conduct a reasonable investigation. Lexington knew or could have learned that the loss occurred in the Western Hemisphere and within the confines of the vessel's trading warranty, yet persistently insisted there had been a breach of that warranty which voided coverage. Lexington has also violated Insurance Board Order 41060 Sec. .003 by its misrepresentation of the insurance policy, which amounts to "unfair and deceptive acts or practices" in the business of insurance. The Court further concludes that Lexington has violated Insurance Board Order 41060 Sec. .004(4). Plaintiffs have been "injured" by Lexington's egregious conduct and are entitled to recover damages resulting from Lexington's violations of art. 21.21 Sec. 16 and the above-noted rules and regulations of the Texas State Board of Insurance.

Having determined that there was coverage for the loss and that Lexington has violated TEX. INS. CODE ANN. art. 21.21, the Court must now ascertain Plaintiffs' damages. It was undisputed that if repairs had been carried out in Malaga, Spain on the Amazon Trader, the sound

market value of the vessel would have been $480,000. The vessel was sold unrepaired for $30,000 less Plaintiffs' survey cost of $9,578 resulting in a depreciation in value of $459,758. The testimony of Plaintiffs' surveyor, Percy Overman, established the reasonable value of repairs was $373,600. The Court concludes that Plaintiffs are entitled to recover $373,600 minus policy deductible of $12,500, for a total of $361,100. Plaintiffs are also entitled to the return of unearned layup premiums of $6,492 for the four consecutive 30 day periods the vessel was in Malaga not under repair. Plaintiffs are therefore entitled to recover the sum of $367,592 under the policy, with prejudgment interest on this sum from the date of the denial of Plaintiffs' loss, August 4, 1982.

Plaintiffs' actual damages caused by Lexington's violations of TEX. INS. CODE ANN. art. 21.21, however, go beyond the mere costs of repairing the vessel, owed under the policy. As a direct result of Lexington's "unfair and deceptive acts or practices" in the handling of their claims, Plaintiffs incurred $109,749 in expenses for crew wages, port expenses, agents, inspections and costs while seeking repair approval and in the sale of the vessel. Moreover, Plaintiffs undisputably lost $390,000 by being unable to contract for the long-term charter of the vessel to Servac. That loss of profit was proximately caused by Lexington's violations of Article 21.21. To the above amounts must be added the costs of repair payable under the policy: $361,100.

The Court finds that Plaintiffs' actual damages caused by Lexington's violations of the Insurance Code total $860,849. Plaintiffs are entitled to receive, the Court concludes, punitive damages three times that amount:

$2,582,547. Plaintiffs may also recover reasonable attorneys' fees and costs of court.

CONCLUSION

In summary, the Court concludes that there was coverage under the policy for the damage to Plaintiffs' vessel and that Plaintiffs are entitled to recover the reasonable cost of repairs and statutory penalties caused by Lexington's violation of TEX. INS. CODE ANN. art. 21.21. It is therefore

ORDERED, ADJUDGED and DECREED that judgment be entered for Plaintiffs, JIM AUSTIN and AULEMIC, INC., against Defendant, LEXINGTON INSURANCE COMPANY, in the sum of $367,592 for amounts owed under the insurance policy, plus prejudgment interest of ten percent (10%) of said sum, accruing from August 4, 1982; and $2,582,547 in punitive damages for Lexington's violations of TEX. INS. CODE ANN. art. 21.21. Plaintiffs shall also recover reasonable attorney's fees and costs of court. The parties will be expected to stipulate the amount of attorney's fees, but not that said attorney's fees are recoverable, and advise the Court within fifteen (15) days from the date of entering of this Memorandum Opinion. If the parties cannot agree, the Court will determine the amount. Interest on the judgment shall accrue at the rate of 9.15% from this date until paid in full.

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs JIM AUSTIN and AULEMIC, INC. recover nothing against the Defendants, HASSAN A. GAAFAR, individually, and SERVAC SHIPPING LINE, LTD., and that Defendant SERVAC SHIPPING LINE,

LTD. recover nothing against Plaintiff JIM AUSTIN, individually.

SIGNED AND ENTERED this the 6th day of June, 1985.

/s/ JOE J. FISHER
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2462

JIM AUSTIN and AULMIC, INC.,
Plaintiffs-Appellees,

v.

SERVAC SHIPPING LINE,
HASSAN A. GAAFAR, IND.,
and LEXINGTON INSURANCE CO.,
Defendants,

LEXINGTON INSURANCE CO.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 8, 5 Cir., 1986, ___F.2d___)

(August 4, 1986)

Before CLARK, Chief Judge, JOLLY and HILL, Circuit Judges.

PER CURIAM:

Appellees' Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ R. M. HILL
United States Circuit Judge

APPENDIX D

TEXAS INSURANCE CODE

ARTICLE 21.21

* * *

Relief available to injured parties

Sec. 16. (a) Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.

(b) In a suit filed under this section, any plaintiff who prevails may obtain:

(1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;

(2) an order enjoining such acts or failure to act;

(3) any other relief which the court deems proper.

(c) On a finding by the court that an action under this section was groundless and brought in bad faith or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended.

(d) In an action under this section, damages may not include any damages incurred beyond a point two years prior to the institution of the action.

* * *

STATE BOARD OF INSURANCE
STATE OF TEXAS

(S E A L)

IT IS HEREBY CERTIFIED That the instrument which is hereunto attached is a true, full and correct copy of Official Order No. 27085 of the State Board of Insurance of the State of Texas, dated May 17, 1974, consisting of six (6) pages; Subject Considered:

REGULATION IN RESPECT OF UNFAIR CLAIM SETTLEMENT PRACTICES

now on file in and forming a part of the records of the State Board of Insurance.

IN WITNESS WHEREOF, I hereunto subscribe my name and affix the Seal of the State Board of Insurance, in the City of Austin, State of Texas this

15th day of July, 1981

EULA E. (PAT) WAGNER
Chief Clerk

By: /s/ LADELL ANDERSON
Asst. Chief Clerk

No. 27085

RECORD OF OFFICIAL ACTION
of the
STATE BOARD OF INSURANCE
AUSTIN, TEXAS

Date May 17, 1974

Subject Considered:

REGULATION IN RESPECT OF UNFAIR CLAIM SETTLEMENT PRACTICES

General remarks and official action taken:

On January 31, 1974, the State Board of Insurance, after notice, held a public hearing on unfair claim settlement practices rules. Based upon the necessity shown in such hearing for the issuance of rules and regulations pertaining to unfair claim settlement practices, the State Board of Insurance does hereby, under the provisions of Article 21.21-2 of the Insurance Code, promulgate the following rules and regulations pertaining to unfair claim settlement practices:

RULES AND REGULATIONS OF THE STATE BOARD OF INSURANCE IN RESPECT OF UNFAIR CLAIM SETTLEMENT PRACTICES

Section 1. SHORT TITLE.

These regulations shall be known as the "Unfair Claim Settlement Practices Rules."

Section 2. DEFINITIONS.

The following words or phrases as used in these regulations shall have the meaning placed opposite them unless the explicit wording of a regulation shall otherwise direct:

(a) Claim—A request or demand reduced to writing and filed by a Texas resident with an insurer for payment of funds or the providing of services under the terms of a policy, certificate or binder of insurance.

(b) Claimant—A person making or having made a claim.

(c) Complaint—Any written communication, not solicited by an insurer, primarily expressing a grievance relating to an unfair claim settlement practice as defined in Section 3 hereof.

(d) First party coverage—Benefits and other rights provided by an insurance contract to an insured.

(e) Third party coverage—Benefits and other rights provided by an insurance contract to any person other than an insured.

(f) Insurer—Any person, or persons acting in concert, doing or licensed to do business in Texas under Subchapter G of Chapter 3 or Subchapters A, B or C of Chapter 5 of the Insurance Code, as amended, and including (when applicable) proprietorships, partnerships, corporations and unincorporated associations, stock and mutual life, health, accident, fire, casualty, fire and casualty, hail, storm, title, and mortgage guarantee companies; mutual assessment companies; local mutual aid associations; local mutual burial associations; statewide mutual assessment

companies; stipulated premium companies; fraternal benefit societies; group hospital service organizations; county mutual insurance companies; Lloyds; reciprocal or inter-insurance exchanges and farm mutual insurance companies when transacting such business.

(g) Policyholder—The owner of a policy, certificate, or binder of insurance, and any insured, named insured, or obligee under a bond.

Section 3. UNFAIR CLAIM SETTLEMENT PRACTICES.

No insurer shall engage in unfair claim settlement practices. Unfair claim settlement practices shall mean committing or performing with such frequency as to indicate a general business practice any of the following:

(a) Misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue.

(b) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, provided that "pertinent communications" shall exclude written communications that are direct responses to specific inquiries made by the insurer after initial report of a claim. An acknowledgement within 15 working days shall be presumed reasonably prompt.

(c) Failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies.

(d) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonable clear.

(e) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.

(f) Failure of any insurer to maintain a complete record of all complaints which it has received during the preceding three years or since the date of its last examination by the Commissioner of Insurance, whichever time is shorter. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. A record of such complaints maintained in substantially the form as indicated on Exhibit A attached hereto will be presumed to be in compliance with this requirement, but Exhibit A shall not be considered as the exclusive method to record such complaints.

(g) Failing to provide promptly, when provided for in the policy, claim forms when the insurer requires such forms as a prerequisite for a claim settlement.

(h) Not attempting in good faith to settle promptly claims where liability has become reasonably clear under one portion of the policy in order to influence settlement under other portions of the policy coverage. (This provision shall not apply to those situations where payment under one portion of coverage constitutes evidence of liability under another portion of coverage.)

(i) Failing to provide promptly a policyholder a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(j) Failing to affirm or deny coverage of a claim to a policyholder within a reasonable time after proof of loss statements have been completed. The taking of a non-waiver agreement or the submission of a reservation of rights letter by an insurer to the policyholder within a reasonable time shall be deemed compliance with the provisions of this paragraph.

(k) Except as may be specifically provided in the policy, to refuse, fail, or unreasonably delay offer of settlement under applicable first-party coverage on the basis that other coverage may be available or third parties are responsible in law for damages suffered.

(l) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(m) Undertaking to enforce a full and final release from a policyholder when, in fact, only a partial payment has been made. (This rule shall not prevent or have application to the compromise settlement of doubtful or disputed claims.)

(n) Failing to establish a policy and proper controls to make certain that agents calculate and deliver to policyholders or their assignees funds due under policy provisions relative to cancellation of coverage within a reasonable time after such coverages are terminated.

(o) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

(p) Failing to respond promptly to a request by a claimant for personal contact about or review of the claim.

Section 4. SPECIAL CLAIMS REPORTS AND STATISTICAL PLAN.

If it should be found by the State Board of Insurance, based on complaints of unfair claims settlement practices as described in Section 3 hereof, that an insurer is substantially out of line and should be subjected to closer supervision with respect to such practices, it may require such insurer to file a report at such periodic intervals as the Board deems necessary. For purposes of this Section, the term "substantially out of line" shall mean "a patently disproportionate number of complaints to indicate the existence of a pattern of unfair claim settlement practices as that term is defined in Section 3 hereof." Such periodical reports shall contain the following information:

(a) The total number of written claims filed, including the original amount filed for by the insured and the classification by line of insurance of each individual written claim, for the past 12 month period or from the date of the insurer's last periodic report, whichever time is shorter;

(b) The total number of written claims denied for the past 12 month period or from the date of the insurer's last periodic report, whichever is shorter;

(c) The total number of written claims settled, including the original amount filed for by the insured, the settled amount, and the classification of line of insur-

ance of each individual settled claim, for the past 12 month period or from the date of the insurer's last periodic report, whichever time is shorter;

(d) The total number of written claims for which lawsuits were instituted against the insurer, including the original amount filed for by the insured, the amount of final adjudication, the reason for the lawsuit and the classification by line of insurance of each individual written claim, for the past 12 month period or from the date of the insurer's last periodic report, whichever time is shorter; and

(e) The total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. Such periodic reports shall be filed with the State Board of Insurance and the Commissioner of Insurance.

Section 5. MINIMUM STANDARD OF PERFORMANCE.

All insurers shall maintain their affairs so that no unfair claim settlement practices are committed and the State Board of Insurance does hereby declare that the minimum standard of performance for all insurers (as that term is used in Article 21.21-2 of the Insurance Code) is compliance with the provisions of Section 3 of these regulations.

This Order is based upon the necessities and opinion of the Board as to need to protect the public of this State as shown in prior public hearing. This Order may be altered by further Order of the State Board of Insurance

to provide such additional material and to otherwise alter provisions of this Order as the State Board of Insurance deems necessary concerning the matters raised at said hearing

STATE BOARD OF
INSURANCE

/s/ JOE CHRISTIE
Joe Christie, Chairman

/s/ NED PRICE
Ned Price, Member

/s/ DURWOOD MANFORD
Durwood Manford, Member

Recommended and Prepared by:

/s/ DON B. ODUM
Don B. Odum
Commissioner of Insurance

STATE BOARD OF INSURANCE
STATE OF TEXAS

(S E A L)

IT IS HEREBY CERTIFIED That the instrument which is hereunto attached is a true, full and correct copy of Official Order No. 41060 of the State Board of Insurance of the State of Texas, dated June 4, 1982, consisting of three (3) pages; Subject Considered:

> AMENDMENT OF THE PERMANENT AND GENERAL RULES AND REGULATIONS OF THE STATE BOARD OF INSURANCE AS FILED WITH THE TEXAS REGISTER DIVISION, OFFICE OF THE SECRETARY OF STATE, BY AMENDING THE RULES AND REGULATIONS OF THE STATE BOARD OF INSURANCE OF TEXAS ON UNFAIR COMPETITION AND UNFAIR PRACTICES OF INSURERS, AND ON MISREPRESENTATION OF POLICIES, AND INCLUDING REGULATION OF INSURANCE TRADE PRACTICES IN RESPECT OF ADVERTISING AND SOLICITATION (BOARD ORDER 18663) RULES 059.50.-01.001 - .005

now on file in and forming a part of the records of the State Board of Insurance.

IN WITNESS WHEREOF, I hereunto subscribe my name and affix the Seal of the State Board of Insurance, in the City of Austin, State of Texas, this

29th day of April, 1985

JAMES W. NORMAN
Chief Clerk

By: /s/ JAMES W. NORMAN
Custodian of the Record

No. 41060

RECORD OF OFFICIAL ACTION

of the

STATE BOARD OF INSURANCE

AUSTIN, TEXAS

Date: June 4, 1982

Subject Considered: AMENDMENT OF THE PERMANENT AND GENERAL RULES AND REGULATIONS OF THE STATE BOARD OF INSURANCE AS FILED WITH THE TEXAS REGISTER DIVISION, OFFICE OF THE SECRETARY OF STATE, BY AMENDING THE RULES AND REGULATIONS OF THE STATE BOARD OF INSURANCE OF TEXAS ON UNFAIR COMPETITION AND UNFAIR PRACTICES OF INSURERS, AND ON MISREPRESENTATION OF POLICIES, AND INCLUDING REGULATION OF INSURANCE TRADE PRACTICES IN RESPECT OF ADVERTISING AND SOLICITATION (BOARD ORDER 18663) RULES 059.50.01.001 - .005

General remarks and official action taken:

On this day came on for consideration by the State Board of Insurance, amendments to the "Rules and Regulations of the State Board of Insurance of Texas on Unfair Competition and Unfair Practices of Insurers, and on Misrepresentation of Policies, and Including Regulation of Insurance Trade Practices in Respect of Advertising and Solicitation." The amendments contain minor editorial changes, delete surplus and unnecessary language

and correct typographical errors contained in the rules when they were filed as existing rules with the *Texas Register* at or about the time the Administrative Procedure and Texas Register Act went into effect. The amendments are primarily editorial and nonsubstantive and do not change the Board's practices. One correction of a typographical error changes Rule 059.50.01.004(1) to conform to statutory law. Although only rules 059.50.-01.001, .004(1) and .005 are amended, the entire set of rules are reproduced in this Order. It is the opinion of the Board that the amendments should be adopted.

The amendments were published as proposals in the February 19, 1982 edition of the *Texas Register* (7 Tex. Reg. 688). No comments were received. The amendments are enacted under authority of Articles 21.20 and 21.21 of the Texas Insurance Code, and other applicable provisions of the Code which authorize the Board to promulgate rules and regulations to specify and prohibit unfair competition and unfair practices in the business of insurance; and pursuant to the Board's authority to make nonsubstantive editorial clarifications and changes in its rules which are necessary or appropriate for the Board to carry out its statutory duties. It is certified that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

IT IS THEREFORE the Order of the State Board of Insurance that Rules 059.50.01.002, .003 and .004 (2) - (5) be reproduced and Rules 059.50.01.001, .004(1) and .005 be and the same are hereby amended, ordered and prescribed to read as follows:

SECTION 1. The following RULES AND REGULATIONS are ADOPTED, PRESCRIBED AND ORDERED by the State Board of Insurance.

> "Rules and Regulations of the State Board of Insurance of Texas On Unfair Competition and Unfair Practices of Insurers and on Misrepresentation of Policies, and Including Insurance Trade Practices in Respect of Advertising and Solicitation
> 059.50.01.001 - .005."

.001. Deceptive Acts or Practices of Insurers, Agents and Connected Persons. Purpose of Regulation. It is the purpose these Rules and Regulations to further define and state the standards that are necessary to prohibit deceptive acts or deceptive practices by insurers and insurance agents and other persons in their conduct of the business of insurance or in connection therewith, whether done directly or indirectly, and irrespective of whether the person is acting as insurer, principal, agent, employer, or employee, or in other capacity or connection with such insurer.

.002. Interpretations. The meanings given to the provisions, terms and words of this regulation are not to be limited to the common law meaning which may have been given thereto but are to be interpreted to accomplish the purpose of these rules and regulations in accordance with the provisions of Section 13 of Article 21.21 of the Insurance Code.

.003. Unfair Trade Practices Prohibited. (a) Misrepresentation of insurance policies, unfair competition, and unfair practices by insurers, agents and other connected persons are prohibited by Article 21.20 and

Article 21.21 or by other provisions of the Insurance Code of Texas and by the rules and regulations of the State Board of Insurance. No person shall engage in this State in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition, or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code of Texas or as defined by these and other Rules and Regulations of the State Board of Insurance authorized by the Code.

(b) Irrespective of the fact that the improper trade practice is not defined in any other section of these Rules and Regulations, no person shall engage in this State in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

.004. Misrepresentation Defined. Standards for Determining Misrepresentation. The term misrepresentation, or the prohibited conduct, act or practice that constitutes misrepresentation by a person subject to the provisions of this regulation, is defined as any one of the following acts or omissions:

(1) any untrue statement of a material fact; or

(2) any omission to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they are made) not misleading; or

(3) the making of any statement in such manner or order as to mislead a reasonably prudent person to a false conclusion of a material fact; or

(4) any material misstatement of law; or

(5) any failure to disclose any matter required by law to be disclosed, including failure to make disclosure in accordance with the provisions of these and other applicable regulations of the State Board of Insurance.

.005. Enforcement. The Commissioner shall cause to be brought such legal action as is authorized by the Code in the enforcement of these regulations and cause to be enjoined misrepresentations and other unfair trade practices."

SECTION 2. The above Rules and Regulations are ORDERED by the State Board of Insurance; and this Order shall be in full force and effect from and after the date of its signing, and the Rules and Regulations, subject to their provisions, from and after twenty days from the date of filing with the Texas Register Division of the Secretary of State.

This Order remains open for any amendments, corrections, additions or other changes which be made or ordered by the Board.

AND IT IS SO ORDERED.

STATE BOARD OF
INSURANCE

/s/ W. P. DAVES, JR.
W. P. Daves, Jr., Chairman

/s/ DURWOOD MANFORD
Durwood Manford, Member

/s/ LYNDON L. OLSON, JR.
Lyndon L. Olson, Jr., Member

RECOMMENDED AND PREPARED BY:

/s/ A. W. POGUE
A. W. Pogue, Division
Manager, Policy Approval

/s/ JAMES W. NORMAN
James W. Norman
Chief Clerk